BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD DEAN LINGENFELTER	)	
Claimant	)	
	)	
VS.	)	
	)	
FAZOLI'S RESTAURANT	)	
Respondent	)	Docket No. 1,014,976
	)	
AND	)	
	)	
TRANSPORTATION INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the April 12, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

ISSUES

The ALJ concluded claimant failed to sustain his burden to prove personal injury by accident arising out of and/or in the course of employment. The ALJ specifically indicated that "[w]hile there is evidence that [c]laimant's knee 'popped' after re-entering the restaurant [his place of work] on December 27, the evidence presented fails to establish that such injury 'arose out of' his employment with [r]espondent."[1]

The claimant requests review of this determination. No brief was filed in support of this request although presumably claimant would argue that his evidence is sufficient to establish his entitlement to benefits under the Kansas Workers Compensation Act, K.S.A. 44-501 et seq.

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[1] ALJ Order (Apr. 12, 2004).

Respondent argues the ALJ's Order should be affirmed in all respects. Respondent maintains claimant's inconsistent testimony, coupled with irregularities in the work release slips and claimant's previous history of right knee problems, seriously compromise claimant's credibility and therefore justify the ALJ's determination and the denial of benefits.

The sole issue to be decided is whether claimant sustained his burden to prove that his right knee injury "arose out of" his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

Claimant is employed as a steam line cook but at times has been called upon to do other activities, including changing light bulbs and changing the lettering on an exterior sign advertising specials for respondent's restaurant. On December 27, 2003, store manager, Monjurul Alam, asked claimant to change the sign out front. This required claimant to retrieve a ladder from a shed and climb up to the sign, exchanging the letters for the advertisement.

When this activity was first discussed, claimant was standing with Mr. Alam and another co-worker, Phyllis Miller, who is also the store's trainer. According to Ms. Miller, she told Mr. Alam that claimant was under a doctor's restriction and was not to climb or bend his knee due to an earlier knee injury.[2] Claimant testified that he told Mr. Alam the same thing. Nevertheless, claimant and Mr. Alam proceeded outside to change the letters on the sign.

After climbing up the ladder the first time, claimant testified his leg was hurting. He moved the ladder and again climbed up. As he was coming down, claimant says he missed a step and his right leg just gave out and that there was a loud pop.[3]

Mr. Alam denies that anything out of the ordinary happened while the two men were changing the letters on the sign. In fact, he testified that after the job was done, the two walked across the street for a smoke break and looked at cars. He further testified claimant voiced no complaints about an injured knee and was able to walk without difficulty. The two men returned to the store after the break was over and Mr. Alam returned the ladder to the building.

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[2] Miller Depo. at 6.

[3] P.H. Trans. at 10.

As claimant was walking back in to the store he encountered Phyllis Miller. She testified she heard a "pop" in claimant's knee.[4] Ms. Miller asked claimant if he was alright and suggested he go sit down. Shortly thereafter claimant left work.

The next day claimant says he went in to work. At some point thereafter, possibly the next day, claimant called in to work and advised Phyllis Miller of soreness in his knee and the need to see a doctor. Mr. Alam advised claimant to go to a local health facility where he was diagnosed with a sprain/strain to the right knee.[5]

Claimant continued to have problems and was eventually referred to Dr. Erik Severud, an orthopaedic physician, who has treated claimant before. Claimant has had no less than 3 surgeries to his right knee and 2 surgeries to his left knee, some of those due to work-related injuries. In fact, the most recent surgery (to his left knee) occurred in July 2003. It was this surgery that apparently led to claimant's restrictions to avoid climbing.

Upon presenting the off-work slips to his general manager, Terri Windham, a dispute developed between the parties. Ms. Windham became suspicious of some alterations on an off work slip and took it upon herself to confirm the accuracy of those documents. She testified that the slips that were presented to her by the claimant were not consistent with those contained within Dr. Severud's records.[6]

When benefits were not forthcoming, a preliminary hearing was held on March 11, 2004. The ALJ heard claimant's testimony as well of that of Mr. Alam. Pursuant to the parties' agreement, the record remained open so that additional testimony from Ms. Miller and Ms. Windham could be taken. Following receipt and consideration of all this evidence, the ALJ concluded as follows:

> Claimant's preliminary hearing requests are denied. Claimant has failed to sustain his burden of proof of personal injury by accident arising out of and/or in the course of employment with respondent. Claimant's evidence fails to establish that he suffered a knee injury while working on a ladder on December 27, 2003. While there is evidence that Claimant's knee 'popped' after re-entering the restaurant on December 27, the evidence presented fails to establish that such injury "arose out of" his employment with Respondent.[7]

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[4] Miller Depo. at 7-8.

[5] P.H. Trans., Claimant's Ex. 1at 1 and 3.

[6] Windham Depo. at 7.

[7] ALJ Order (Apr. 12, 2004).

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

In *Kindel*, the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

> The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501, *et seq.*, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

The ALJ concluded first, that there was insufficient evidence to conclude claimant suffered an injury while on the ladder. This determination was, no doubt, influenced by inconsistencies in claimant's recitation of the facts and circumstances surrounding his injury and subsequent treatment. Claimant offered varying descriptions as to who replaced the ladder on the day of his accident. There was also some rather persuasive evidence to suggest that claimant, or someone acting in his interest, altered the off work slips following the accident. Given this evidence as well as his impressions during the preliminary hearing when he had an opportunity to personally observe claimant, the ALJ was not persuaded that claimant sustained an accident while on the ladder.

Second, the ALJ was not persuaded that the "pop" heard by Ms. Miller and experienced by the claimant while re-entering the restaurant bore any causal connection to his work. In this instance, it would appear that claimant's credibility, or lack thereof, had an impact on this determination.

The Board generally gives some deference to the ALJ who is in the unique position of observing the witnesses and forming a judgment as to the credibility and weight the

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[8] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

[9] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[10] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

resulting testimony deserves. Here, the ALJ concluded claimant neither suffered injury while on the ladder nor established a causal connection between the uncontroverted "pop" in his knee and his work activities. Under these facts and circumstances, the Board finds the ALJ's determination should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.[11]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated April 12, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2004.

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Steven Marsh, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[11] K.S.A. 44-534a(a)(2).